ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Interconnection and Resale	)	CC Docket No. 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	

To: The Commission

REPLY COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

In accordance with Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), the Personal Communications Industry Association ("PCIA") hereby submits its reply to the petitions for reconsideration and oppositions filed in connection with the Commission's *First Report and Order* in the above-captioned proceeding.[1] As discussed in detail below, the record provides substantial support for the following positions advanced in PCIA's Petition for Reconsideration and Clarification:

- Initially, numerous parties agree that an analysis of the costs and benefits of a resale requirement in the CMRS context indicates that no CMRS operators should be subject to a mandatory federal resale obligation.
- In the alternative, should the Commission decide to retain the CMRS resale rule, the record supports revisions or clarifications that:
  - ▸ modify the text of the CMRS resale rule to make clear that only *unreasonable* resale limitations are prohibited;
  - ▸ clarify that the resale rule does not extend to non-Title II customer premises equipment ("CPE") included in bundled service and equipment packages;

---

[1] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-263, (released July 12, 1996) [hereinafter *First Report and Order*].

- make plain that the CMRS resale rule does not require carriers to provide access to proprietary technologies and products; and
- narrow the definition of "covered SMR providers."

PCIA submits that rule changes and clarifications consistent with these recommendations will promote the public interest by eliminating unnecessary and unduly burdensome regulatory requirements, thereby allowing the CMRS marketplace to reach its full potential to the ultimate benefit of consumers.

I. Numerous Parties Agree That An Analysis of the Costs and Benefits of A Mandatory CMRS Resale Rule Leads To the Conclusion That Such A Requirement Is Unnecessary and Inappropriate.

In its Petition for Reconsideration of the *First Report and Order*, PCIA demonstrated that the adoption of a mandatory CMRS resale rule is inappropriate because the costs of such a rule outweigh any potential benefits.[2] In particular, PCIA noted that resale obligations have historically been imposed as means for increasing -- or creating -- competition in highly concentrated market segments; indeed, until the adoption of the CMRS resale rule, an affirmative resale obligation had been imposed only on service categories where an individual provider or class of providers possessed market power.[3]

PCIA explained that, in contrast, the level of competition in the CMRS marketplace, including that portion offering two-way switched voice and data services, is already much greater than in other market segments where the Commission has decided to impose a federal resale requirement, and will increase significantly over the next few years. Similarly, PCIA

---

[2] The Personal Communications Industry Association, Petition for Reconsideration and Clarification, CC Docket No. 94-54, at 4-11 (filed Aug. 23, 1996) [hereinafter *PCIA Petition for Reconsideration and Clarification*].

[3] *Id.* at 4-5.

underscored the well-settled observation that, in competitive environments where capacity is prevalent and services are largely substitutable, as is the case with broadband CMRS offerings, facilities-based carriers cannot gain a competitive advantage by denying resale capacity. In fact, in such circumstances, facilities-based operators have an incentive to promote distribution of their services through resellers.[4] Finally, PCIA documented several significant costs that a mandatory resale requirement will create for affected CMRS operators and consumers, and submitted that a cost/benefit analysis clearly indicates that the costs of a federal CMRS resale rule far outbalance any potential benefit.

Numerous parties agree. For example, Nextel Communications, Inc. ("Nextel") correctly points out that, "[i]n a competitive marketplace with two cellular providers, up to six PCS providers, and one or more covered SMR providers, a resale obligation is not needed to promote competition."[5] Nextel further states that "[t]he Commission should have simply eliminated the resale obligation for all CMRS licensees."[6] Sprint Spectrum L.P. ("Sprint PCS") also stresses that "regulation that is not required as a corrective to market power is likely to be inefficient and anticompetitive," and, on this basis, submits that "the mandatory resale requirement for CMRS service should be withdrawn."[7]

---

[4] *Id.* at 7-8.

[5] Nextel Communications, Inc., Petition for Reconsideration or Clarification, CC Docket No. 94-54, at 2 (filed Aug. 23, 1996).

[6] *Id.* at 4.

[7] Reply of Sprint Spectrum L.P., d/b/a Sprint PCS, in Support of Petitions for Reconsideration and Clarification, CC Docket No. 94-54, at 4 (filed Oct. 7, 1996) [hereinafter *Sprint PCS Reply*].

Similarly, in responding to various resellers' objections to the Commission's decision to sunset the CMRS resale rule, Bell Atlantic NYNEX Mobile ("BANM") states that:

> The real issue for the Commission, as it reconsiders the *First Report and Order*, is whether the resale rule should be kept *at all*. PCIA and Nextel argue that the resale rule should be terminated now. Their petitions echo the comments of BANM and other parties which had recommended repealing the rule once the PCS licenses are issued because at that point the basis for the rule -- the duopoly cellular market structure -- will have disappeared.[8]

AT&T Corp. ("AT&T") also endorses PCIA's observation that the level of competition in the CMRS marketplace is much greater than that in any other telecommunications segment where a resale obligation has been imposed, and states that "[t]hese market conditions significantly diminish the potential for anticompetitive behavior."[9] In addition, AT&T agrees that "[t]here are multiple costs associated with mandating resale, including legal and administrative costs and deterred aggressive pricing and innovation offerings."[10]

Simply put, the record contains substantial support for PCIA's position that the goals the Commission hopes to achieve by adopting a mandatory CMRS resale rule -- increased competition and a diffusion of market power -- already exist, and are being amplified through market forces without regulatory intervention. Significantly, although several resellers support the adoption of a mandatory CMRS resale requirement and urge the Commission to

---

[8] Bell Atlantic NYNEX Mobile, Inc., Opposition to Petitions for Reconsideration, CC Docket No. 94-54, at 5 (filed Sept. 27, 1996).

[9] AT&T Corp., Opposition to Petitions for Reconsideration, CC Docket No. 94-54, at 3-4 (filed Sept. 27, 1996) [hereinafter *AT&T Opposition*].

[10] *Id.* at 4.

retain the resale rule beyond the sunset date,[11] the record will not allow the Commission to satisfy its obligation of ensuring that this new regulatory requirement is sufficiently justified and is not unnecessarily burdensome or otherwise injurious.[12]

II. If the Commission Retains the CMRS Resale Obligation, the Resale Rule Should Be Revised or Clarified in Several Respects.

A. The Commission Should Make Plain That the CMRS Resale Rule Prohibits Only *Unreasonable* Restrictions on Resale.

In its Petition for Reconsideration, PCIA asked the Commission to modify the text of the CMRS resale rule to reflect that only *unreasonable* restrictions on resale are prohibited.[13] This modification is necessary to make the rule consistent with the text of the *First Report and Order* and the Commission's resale policies. The requested modification was unopposed, and should be adopted to foreclose any uncertainty that the rule in its current form may create with respect to the scope of the CMRS resale obligation.

B. The Record Supports A Clarification To the Effect That the CMRS Resale Rule Does Not Apply To Customer Premises Equipment ("CPE") in Bundled Service and CPE Packages.

The record contains strong support for PCIA's request that the Commission clarify that non-Title II components of bundled service and CPE packages are not subject to the

---

[11] *See, e.g.*, Connecticut Telephone and Communications Systems, Inc., Petition for Reconsideration, CC Docket No. 94-54, at 4-10 (filed Aug. 23, 1996); The National Wireless Resellers Association, Petition for Reconsideration, CC Docket No. 94-54, at 9-19 (filed Aug. 23, 1996); Comments of Cable & Wireless, Inc., CC Docket No. 94-54, at 2-5 (filed Sept. 27, 1996); Comments of MCI Telecommunications Corp., CC Docket No. 94-54, at 2 (filed Sept. 27, 1996); Comments of the Telecommunications Resellers Association, CC Docket No. 94-54, at 5-10 (filed Sept. 27, 1996).

[12] *See* 47 U.S.C. § 10(a) (1996).

[13] *PCIA Petition for Reconsideration and Clarification*, at 11.

CMRS resale rule.[14] As discussed at length in PCIA's Petition for Reconsideration, the Commission does not have authority to require resale of the CPE component of a bundled offering, including a bundled CMRS offering, because the Commission has held -- and the D.C. Circuit has affirmed -- that the provision of CPE is not a common carrier service and, therefore, is not subject to Title II.[15] Several parties, including AT&T, CTIA, GTE, and Sprint PCS, agree with this analysis.[16] In addition, AT&T correctly points out that, "[e]ven if the Commission could legally extend the resale requirement to [non-Title II] . . . services and equipment, there is no policy justification for doing so."[17]

Significantly, those parties that urge the Commission to subject CPE in bundled offerings to the CMRS resale rule offer no explanation as to how the Commission could possibly get around the legal hurdle forbidding the imposition of Title II obligations on non-common carrier offerings.[18] In view of the legal fallibility of a requirement subjecting non-Title II CPE to the resale rule, as well as the fact that there are no justifiable policy reasons

---

[14] *See id.* at 12-16.

[15] *Id.* at 13-14.

[16] *See AT&T Opposition*, at 6; *Sprint PCS Reply*, at 5; Comments of the Cellular Telecommunications Industry Association, CC Docket No. 94-54, at 4 (filed Sept. 27, 1996) [hereinafter *CTIA Comments*]; GTE Service Corp., Reply to Oppositions, CC Docket No. 94-54, at 5-7 (filed Oct. 7, 1996) [hereinafter *GTE Reply*].

[17] *AT&T Opposition*, at 6. *See also Sprint PCS Reply*, at 4-6; *CTIA Comments*, at 2-3; *PCIA Petition for Reconsideration and Clarification*, at 15-16.

[18] *See, e.g,* Comments of MCI Corporation, CC Docket No. 94-54, at 3-4 (filed Sept. 27, 1996); The National Wireless Resellers Association, Opposition to AT&T Corp.'s Petition for Partial Reconsideration, CC Docket No. 94-54, at 2 (filed Sept. 27, 1996); Comments of the Telecommunications Resellers Association, CC Docket No. 94-54, at 11-12 (filed Sept. 27, 1996).

for doing so, the Commission should clarify that the CMRS resale rule does not extend to non-Title II CPE in bundled service and equipment packages.

C. The Commission Should Clarify That the CMRS Resale Rule Does Not Require Carriers To Provide Access To Proprietary Technologies and Products.

The record also supports adoption of a clarification making plain that the CMRS resale rule does not require carriers to provide access to proprietary technologies and products. As detailed in PCIA's Petition for Reconsideration, requiring CMRS operators to provide competitors access to proprietary technologies and products will create a disincentive to the development of new offerings because underlying carriers will not be able to retain control over products in which they have invested considerable resources in an effort to distinguish themselves in the marketplace.[19]

AT&T and GTE share this concern. In particular, AT&T states that failure to grant PCIA's requested clarification "would deter carriers from expending the resources necessary to create new and innovative offerings."[20] AT&T also underscores that "[c]arriers must be able to distinguish themselves in this manner or the pace of technological development will slow considerably."[21] Although MCI argues that access to proprietary technologies is necessary to enable resellers to operate CPE capable of communicating via the carrier's

---

[19] *PCIA Petition for Reconsideration and Clarification*, at 16-17.

[20] *AT&T Opposition*, at 6-7.

[21] *Id. See also GTE Reply*, at 3-4 ("By imposing a rule that requires proprietary equipment and technology to be shared with competitors, the Commission largely eliminates firms' ability to compete in terms of product differentiation and thereby eliminates some of the incentive to develop innovative new products").

transmission offering,[22] the Commission has only adopted network disclosure requirements where the entity subject to those requirements has market power, such as in the landline telephone market sector. These requirements have never been extended to a competitive environment, such as the CMRS marketplace, where innovation is a key competitive consideration and where a disclosure requirement would in effect require a carrier to share with competitors the proprietary products and technologies that make it unique.

D. The Record Contains A Strong Basis For Revision of the Definition of "Covered SMR Providers."

Finally, several parties ask the Commission to revise the definition of "covered SMR providers" to implement more effectively the Commission's intention to exclude those SMR licensees that do not have significant potential to compete directly with cellular and broadband PCS.[23] After reviewing the definitional proposals suggested by each of the parties addressing this issue, PCIA continues to believe that a definition based on a simple mobile count is the best way to carry out the Commission's intent.

PCIA has held numerous discussions with its members and has reviewed a variety of proposals aimed at formulating a bright-line test that will be effective in separating SMR operators that are potential competitors with cellular and broadband PCS from those that lack such capabilities. On the basis of these discussions, which have continued during the pendency of the Petitions for Reconsideration in this proceeding, PCIA recommends that the

---

[22] Comments of MCI Telecommunications Corp., CC Docket No. 94-54, at 3-4 (filed Sept. 27, 1996).

[23] *First Report and Order*, ¶ 19. In addition to PCIA, the following parties request that the definition of "covered SMR providers" be revised: the American Mobile Telecommunications Association, Inc., ("AMTA"), Nextel Communications, Inc., and Small Business in Telecommunications, Inc.

Commission define "covered SMR providers" to include those SMR systems (not individual call signs) with a minimum of 100,000 mobile units. In addition, beyond this threshold, and consistent with the *First Report and Order*, "covered SMR providers" should encompass only those SMR licensees that offer "real-time, two-way switched voice service that is interconnected with the public network, either on a stand-alone basis or packaged with other telecommunications services."[24] In this regard, and as the preceding discussion makes clear, the definition of "covered SMR providers" contained in the *First Report and Order* already excludes paging operators. As such, PCIA concurs with PageNet's view that the additional clarity PCIA is seeking need not and should not modify that fact.[25]

As outlined in PCIA's Petition for Reconsideration, PCIA's suggested definition will carry out the Commission's intent to limit the reach of the CMRS resale rule to those SMR operators capable of competing with cellular and broadband PCS carriers.[26] In addition,

---

[24] *See id.*

[25] *See* Paging Network, Inc., Opposition to Petition for Reconsideration and Clarification of the Personal Communications Industry Association, CC Docket No. 94-54 (filed Sept. 27, 1996).

[26] Bell Atlantic NYNEX Mobile argues that the *CMRS Third Report and Order* somehow limits the Commission's discretion to apply regulatory requirements to wide-area SMRs that differ from those applicable to cellular and broadband PCS operators. Bell Atlantic NYNEX Mobile, Inc., Opposition to Petitions for Reconsideration, CC Docket No. 94-54, at 8-9 (filed Sept. 27, 1996). Contrary to BANM's suggestion, it is well settled that the Commission's decision in the *CMRS Third Report and Order* and Congress's 1993 amendments to Section 332 of the Communications Act do not require all substantially similar or competing CMRS operators to be subject to identical regulatory requirements. Conformity is not required if the Commission determines that the cost of conforming the rules or obligations in question outweighs the benefits. *See* Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988, 7997 (1994), *recon. pending*.

this approach offers the benefit of regulatory simplicity because CMRS operators are already required to report the number of mobiles on their systems on an annual basis in order to pay regulatory fees. Finally, because the Commission has previously used the concept of the number of customers as a threshold test for the imposition of common carrier-type obligations, there is precedent for the use of such a mechanism here.

III. Conclusion

As the foregoing discussion demonstrates, the record contains strong support for the recommendations advanced in PCIA's Petition for Reconsideration or Clarification. In addition, adoption of PCIA's suggested revisions and clarifications will promote the public interest by eliminating unnecessary regulatory burdens.

Respectfully submitted

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Mark Golden/KK

Mark J. Golden
Vice President -- Industry Affairs
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, Virginia 22314
(703) 739-0300

By: Karen Kincaid

R. Michael Senkowski
Karen A. Kincaid
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

Dated: October 10, 1996

CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 10th day of October 1996, I caused true copies of the foregoing to be delivered to the following persons via first class, postage prepaid mail:

Cheryl A. Tritt
Charles H. Kennedy
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

Cathleen A. Massey
AT&T Wireless Services, Inc.
Vice President - External Affairs
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20037

Howard J. Symons
Sara F. Seidman
Mintz, Levin, Cohn, Ferris,
Glovsky, and Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Larry A. Blosser
Donald J. Elardo
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Wendy C. Chow
Cellular Telecommunications
Industry Ass'n
[redacted]

Judith St. Ledger-Roty
Paul G. Madison
Reed, Smith, Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005

John T. Scott III
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Robert S. Foosaner
Senior Vice President -
Government Affairs
Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Lewis J. Paper
David M. Jans
Jacob S. Farber
Dickstein, Shapiro, Morin
& Oshinsky, LLP
2101 L Street, N.W.
Washington, D.C. 20037

W. Kenneth Ferree
Jonathan Wiener
Goldberg, Godles, Wiener
& Wright
1229 19th Street, N.W.
Washington, D.C. 20036

Richard Ekstrand
The Rural Cellular Ass'n
2120 L Street, N.W.
Suite 520
Washington, D.C. 20554

Matthew J. Whitehead II
Secretary and General Counsel
ARDIS Company
300 Knightsbridge Parkway
Lincolnshire, IL 60069

Dennis C. Brown
Brown & Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006

Douglas L. Povich
Katherine S. Poole
Kelly & Povich, P.C.
1101 30th Street, N.W.
Suite 300
Washington, D.C. 20007

Alan R. Shark, President
American Mobile Telecommunications
Ass'n
1150 18th Street, N.W.
Suite 250
Washington, D.C. 20036

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036

Ann P. Morton
Cable & Wireless, Inc.
8219 Leesburg Pike
Vienna, VA 22182

Andre J. Lachance
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

International Transcription Services, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037*

Robin Walker
Robin Walker

* By Hand Delivery